IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Burlington Northern and Santa Fe Railway Company, The Applicant, v. Public Service Company of Oklahoma, Respondent.	Case No. 05-CV-53-JOE-FHM

RESPONDENT'S MOTION FOR ORDER CONFIRMING ARBITRATION AWARD AND MOTION FOR ENTRY OF JUDGMENT ON AWARD

Respondent Public Service Company of Oklahoma ("PSO") hereby moves the Court to enter an Order, pursuant to Section 9 of the Federal Arbitration Act (the "FAA") (9 U.S.C. § 9), confirming the Arbitration Award[1] submitted to this Court in the above-referenced docket, under seal, on April 24, 2006. PSO also moves that judgment be entered on the Award pursuant to Section 13 of the FAA. 9 U.S.C. § 13.

BACKGROUND

1. PSO and Applicant The Burlington Northern and Santa Fe Railway Company ("BNSF")[2] were parties to a rail transportation agreement (the "Agreement"). The Agreement called for arbitration of certain pricing disputes.

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[1] This Award is entitled "Findings of Fact and Conclusions of Law of the Board of Arbitration" ("Findings of Fact").

[2] References to BNSF includes its corporate predecessors.

2. In 1992, PSO invoked the arbitration provisions in the Agreement. A three-member Arbitration Board proceeded to arbitrate the pricing dispute and entered an award in 1994 (the "1994 Award"). At PSO's request, the 1994 Award was confirmed by this Court,[3] judgment was entered on the 1994 Award,[4] and this judgment was affirmed on appeal.[5]

3. The 1994 Arbitration Board reserved jurisdiction to resolve disputes concerning implementation of the 1994 Award. Following the Arbitration Board's issuance of the 1994 Award, a dispute arose between BNSF and PSO concerning implementation of the 1994 Award. Specifically, BNSF claimed that specified payments PSO made to BNSF, calculated using rates less than $11.77 per ton, were not permitted under the Agreement and the 1994 Award.

4. After extensive delays, BNSF decided to invoke the Arbitration Board's retained jurisdiction to resolve its claim. In conjunction with this decision, BNSF filed an application on November 5, 2004, asking the United States District Court for the Western District of Oklahoma to appoint a new arbitrator to replace one of the arbitrators on the 1994 Arbitration Board who had passed away.

5. BNSF's action in the Western District of Oklahoma was transferred to this Court at the request of the parties. The parties further agreed to request that this Court direct the 1994 Arbitration Board (with a new, third arbitrator) to address BNSF's claim.

6. On March 21, 2005, the Court (The Honorable James O. Ellison) appointed The Honorable Thomas R. Brett to serve as the third arbitrator. The Court also directed the Arbitration Board to address BNSF's claim.

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[3] *See Burlington N. R.R. Co. v. Pub. Serv. Co. of Okla.*, No. 92-C-1196-E (N.D. Okla. Dec. 6, 1994) (the "1994 Confirmation Order").

[4] *See Id.* (Judgment entered Dec. 29, 2004).

[5] *Pub. Serv. Co. of Okla. v. Burlington N. R.R. Co.*, No. 95-5017 (10th Cir. Oct. 20, 1995).

7. The parties proceeded to arbitrate BNSF's claim before the Arbitration Board. On April 24, 2006, the Arbitration Board issued its Award. The Arbitration Board's Award "denied" BNSF's claim in its entirety and determined that "PSO is the prevailing party herein." Award at 21.

THE COURT SHOULD CONFIRM THE AWARD

8. PSO moves the Court to confirm the Award under Section 9 of the FAA. 9 U.S.C. § 9.

9. The Court has jurisdiction to entertain PSO's Motion under 28 U.S.C. § 1332(a)(1) (diversity). PSO is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma, BNSF is a Delaware corporation with its principal place of business in Fort Worth, Texas, and the amount in controversy exceeds the sum of $75,000.00.[6]

10. Venue attaches in this Court under 28 U.S.C. § 1391(a)(2) and, as discussed below, under 9 U.S.C. § 9.

11. Section 9 of the FAA states, in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. The Award meets the Section 9 criteria for confirmation for the reasons discussed in paragraphs 12-15 below.[7]

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[6] *See* Award, Findings of Fact, ¶ 32.

[7] Section 6 of the FAA provides that "[a]ny application to the court [under the FAA] shall be made and heard in the manner provided by law for the making and hearing of motions," subject to exceptions not applicable here. 9 U.S.C. § 6.

12. The parties agreed that a court could enter a judgment on an arbitration award issued under the Agreement. *See* Agreement, ¶ 13.3 (arbitration awards "shall be final and binding on the parties"); the 1994 Confirmation Order, *slip op.* at 12 (confirming the 1994 Award).

13. The Agreement does not specify which court shall confirm an award. Therefore, "application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. Here, the Award was made in the Northern District of Oklahoma.

14. PSO's Motion is timely because the Award was entered on April 24, 2006, and this Motion is being filed "within one year after the award is made." *Id.*

15. Finally, the Award has not been "vacated, modified, or corrected" under Sections 9 and 10 of the FAA. 9 U.S.C. §§ 9, 10.

16. PSO submits contemporaneously herewith a proposed Order Confirming Arbitration Award.

THE COURT SHOULD ENTER JUDGMENT ON THE AWARD

17. Section 13 of the FAA directs that a judgment be entered on a confirmed award. 9 U.S.C. § 13. Such a judgment "shall be docketed as if it was rendered in an action." *Id.* PSO submits contemporaneously herewith a proposed form of Final Judgment.

CONCLUSION

WHEREFORE, PSO moves the Court to enter an Order confirming the Award. PSO also moves the Court to enter judgment on the Award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based upon the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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